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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/800,013	03/05/2001	Pierre Reynes	1059-01	5211

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IP DEPARTMENT OF PIPER RUDNICK LLP
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18TH AND ARCH STREETS
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EXAMINER

MULCAHY, PETER D

ART UNIT PAPER NUMBER

1713

DATE MAILED: 10/22/2003

18

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/800,013

Applicant(s)

REYNES ET AL.

Examiner

Peter D. Mulcahy

Art Unit

1713

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 August 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) 10-13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9, 14 and 15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: |

Art Unit 1713

Claims 1-9, 14 and 15 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

Applicants' claim language "which is not subject to treatment" is seen to be indefinite. The specification at page 4 identifies and supports the cereal grain flour being not subjected to any treatment. Herein it is stated that examples of such treatment are considered to be gelatinization, destructuring or surface modification of the starches. Given that these examples and the breadth of the term "treatment", it is impossible to identify the actual scope of the claim. This is to say that the claim is indefinite given the limited numbers of examples relative to the breadth of the term "treatment." Should the claim be considered definite, then the term "treatment" will be understood to read on gelatinization, destructuring or surface modification of the starches. This is in contrast to the examples which identify drying, sifting and turbo separation as a step that can be taken to modify the constitution of the cereal grain flour. The Examiner maintains that these modifying steps are within the scope of the term "treatment" and as such it is unclear as to exactly what the claim reads upon.

Art Unit 1713

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-9, 14 and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lim et al., U.S. Patent 5,320,669 or Suominen, U.S. Patent 5,118,725.

The rejection as set forth under 35 U.S.C. § 103 on pages 3 and 4 of Paper No. 10 is deemed proper and is herein repeated.

Applicants' newly amended claims as well as the remarks filed in support thereof have been fully considered but have been deemed to be not persuasive.

Applicants argue that the Lim patent teaches that the cereal lipids are to be treated with a solvent so as to extract the lipids and as such be free of fatty acids which would otherwise undergo undesirable reactions upon processing. Applicants allege that this treating step is excluded by the instantly claimed limitation which identifies the cereal flours to be not subject to any treatment. This is not persuasive. The Examiner would

Art Unit 1713

point out that solvent extraction of the lipids is not identified as being an example of a treatment that is to be excluded by the claim limitation. This is not persuasive.

Applicants then allege that the Lim patent does not identify the average granulimetry of the particle size of the cereal flour. The Examiner maintains that given the breadth of the range identified within the claims it would be reasonable for one of ordinary skill in the art to presume that such cereal grain flours which are identified within the Lim patent would fall within the scope of the instantly claimed particle size. Applicants have failed to provide a showing or allegation as to how or why the particle size of the cereal grain identified within the prior art would be outside the scope of the instant claims.

With respect to the Suominen patent, applicants once again argue that the use of untreated cereal grains is not disclosed or suggested within the prior art. Applicants argue further that the patent teaches away from the average granulimetry particle size as claimed.

It is acknowledged that the Suominen patent prefers the cereal grain flour to be of a particle size which is smaller than that as instantly claimed. The prior art is clear as to the desirability of this particle size and teaches that this particle

Art Unit 1713

size enables one to form a very thin film. This patent further teaches that the cereal grain flour particle size is easily manipulated and at column 6 lines 59+ it is stated that the "particles in the invention to only a given limited size, the process can simply be interrupted when the desired particle size has been achieved." Given this language, it is clear that one of ordinary skill in the art is instructed to formulate the cereal grain flour in a broad range of sizes and it is maintained that sizes falling within the scope of the instantly claimed invention are rendered prima facie obvious. The fact of the matter is applicants are not attempting to formulate a very thin film from the material formulated and as such larger sizes of particles can be tolerated. One of ordinary skill in the art would readily appreciate that if a thin film is not required, then larger particle sizes could be utilized and as such, those sizes are obvious to one of ordinary skill in the art.

Applicants then point out that the Suominen patent teaches one of ordinary skill in the art to treat the cereal grain flour in a process as identified at column 5 lines 45+. The Examiner maintains that this disclosure is not seen to identify a treatment which is excluded by the instantly claimed limitation. The steps are simply mixing, separating and drying. These are

Serial No. 09/800,013

-6-

Art Unit 1713

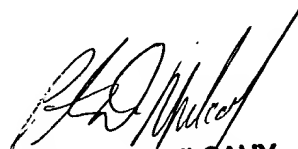
seen to be steps which are identified within the specification as being tolerable.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Peter D. Mulcahy, whose telephone number is (703) 308-2449. The examiner can normally be reached on Tuesday through Friday from 7:30 A.M. to 6:00 P.M.

The fax telephone number for this group is (703) 872-9306.

Any inquiry of general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-2351.

P. Mulcahy:cdc
October 20, 2003



**PETER D. MULCAHY
PRIMARY EXAMINER**